IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 11, 2005 Session

SUN-DROP BOTTLING COMPANY, INC., v. HERB HELTON

Direct Appeal from the Chancery Court for Giles County
No. 2135 Hon. Robert L. Holloway, Jr., Judge

No. M2004-02152-COA-R3-CV - Filed March 6, 2006

In this Declaratory Judgment action, the Trial Court held the contracts the parties were operating under were "at will" contracts. Defendant has appealed. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

Scott C. Williams and Caroline Thomas Trost, Columbia, Tennessee, for Appellant.

L. Bruce Peden, Columbia, Tennessee, for Appellee.

OPINION

In this declaratory judgment action, Sun-Drop Bottling Co. ("Sun-Drop"), asked the Court to declare the respective rights of Sun-Drop and its distributor, Herb Helton ("Helton"), under a written "Distributor Agreement" between the parties entered on July 1, 1996. It averred that the Distributor Agreement covered Helton's distribution of all Sun-Drop's products, regardless of whether all the products were specifically listed in the Agreement, or in the alternative, if the Distributor Agreement did not govern the distribution of all Sun-Drop products, oral agreements govern the distribution of those products not mentioned in the Distributor Agreement.

The Complaint sought a declaratory judgment finding (1) Helton materially breached his obligations under the parties' distribution agreement(s); (2) good cause exists for Sun-Drop to

terminate all of Helton's distribution rights, whether written or oral; (3) Helton's rights under the distributor agreement(s), written or oral, are not transferable or assignable without Sun-Drop's consent; and (4) Helton had assigned all or part of his rights under the distributor agreement(s), thereby constituting a material breach of these agreement(s).

Subsequently, an evidential hearing was held before the Trial Judge on June 3, 2004, and the Court, in its Judgment, noted Sun-Drop's concession at trial that Helton had rights under an oral agreement with Sun-Drop in addition to the rights set forth in the July 1, 1996 Distributor Agreement, and concluded that this oral agreement "was for an indefinite duration," and that Helton had the right to unilaterally terminate the oral agreement without cause. Further the Court declared that "Sun-Drop also has the right to terminate the contract without cause upon reasonable notice, if same is done in fairness, including purchasing items that are unique to the products distributed by Sun-Drop, such as inventory and equipment, for fair value." The Court also found, notwithstanding its finding that Sun-Drop could terminate the contract without cause, that Sun-Drop had cause to terminate the contract because Helton "failed to operate his business according to reasonable business standards and practices" and "basically turned the operation of his business over to his son." The Court finally declared that "[b]ased on the prior course of conduct and dealings between the parties . . . the transfer or assignment of distribution rights by Helton, requires the consent of Sun-Drop," and as to the oral contract, Sun-Drop's "consent cannot be unreasonably withheld."

Helton timely appealed the Trial Court's decision and raised these issues:

1. Whether the trial court erred in finding that Sun-Drop had the right to terminate the oral agreement "at will."

2. Whether the trial court erred in finding that Sun-Drop had cause to terminate the oral agreement.

3. Whether the trial court erred in ruling that Sun-Drop could not unreasonably withhold its consent to assignment of Helton's distribution rights**.**

We review non-jury cases such as this *de novo* upon the record of the proceedings below, and there is a presumption that the Trial Court's findings of fact are correct unless the evidence preponderates to the contrary. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993). Tenn. R. App. P. 13(d).

The relationship between Helton and Sun-Drop is governed by two agreements: the written Distributor Agreement, and an oral agreement established by the parties in 1967 (the "67 Agreement"). Helton has not raised any issue on appeal regarding the written agreement.

As noted, the Trial Court found the 67 Agreement "was for an indefinite duration," and that Sun-Drop "has the right to terminate the [oral] contract without cause upon reasonable notice, if same is done in fairness, including purchasing items that are unique to the products

distributed by Sun-Drop, such as inventory and equipment, for fair value." The parties do not dispute that this Agreement was for an indefinite duration. The parties do dispute whether Sun-Drop had the right to terminate the 67 Agreement "at will" upon reasonable notice.

Generally, "contracts for an indefinite duration are . . . terminable at will by either party with reasonable notice" unless the parties' intentions indicate otherwise. *McReynolds v. Cherokee Ins. Co.*, 896 S.W.2d 777, 779-80 (Tenn. Ct. App. 1994). "The intention of the parties is . . . the ultimate question to be decided on the construction of any agreement." *Id.* at 780. The best evidence of the parties' intentions regarding an oral agreement is the conduct of those parties under that agreement. *Pigg v. Houston & Liggett*, 8 Tenn. App. 613, 1928 WL 2157, at *15 (Tenn. Ct. App. 1928). The court may also consider "the situation of the parties, the business to which the contract relates, the subject matter of the contract, [and] the circumstances surrounding the transaction." *Int'l Flight Ctr. v. City of Murfreesboro*, 45 S.W.3d 565, 570 (Tenn. Ct. App. 2000). The facts must be viewed from the perspective of the parties at the time the contract was made. *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 334 (Tenn. 1983). Unless the preponderance of the evidence contradicts the trial court's finding, we must affirm the Trial Court's factual finding that the 67 Agreement is terminable by either party "at will." *Union Carbide Corp.*

The record establishes that on two occasions Sun-Drop facilitated the transfer of territory between distributors rather than terminate a distributor's privileges "at will." The first of these occasions occurred in 1967. The owner of Sun-Drop at that time, Mr. Shackleford, told Helton that Sun-Drop's distributor in Lewis County was not performing adequately, and asked Helton if he would purchase the distribution rights to Lewis County. The distributor loaned funds for the purchase.

The second occasion occurred on 1974, when Helton relinquished his distribution rights in Williamson County in exchange for $1,000.00. This was part of a transfer of distribution rights from Helton to another Sun-Drop distributor, initiated by Sun-Drop's management. According to Sun-Drop's management, the reason for Sun-Drop facilitating this transfer was that the transferee "wanted to sell more products" and Helton "wasn't really working Williamson County." It is Helton's position that if Sun-Drop had the right to terminate its distribution agreements "at will," why did Sun-Drop facilitate these transfers rather than simply terminating the rights of the Lewis County distributor in 1967 and Helton's Williamson County rights in 1974? However, the trier of fact could conclude that Sun-Drop was motivated by maintaining good will with its distributors, and protecting its reputation which could facilitate the recruitment of distributors in the future. Terminating Helton's distribution rights in Williamson County while retaining him as a distributor in the other counties would be, at best, awkward. Sun-Drop's conduct in facilitating these transfers does not necessarily mean that the right to terminate "at will" did not exist.

The record indicates that investors are willing to pay a significant amount to purchase Sun-Drop distributorships, and Helton argues that if Sun-Drop had the right to terminate its distribution agreement with Helton "at will," Franklin Distributing would not be willing to pay

$150,000.00 for Helton's rights[1] under that agreement. The Agreement between Helton and Franklin took effect on October 8, 1979, and on that date, Franklin and Sun-Drop executed a written distribution agreement which stated unequivocally that either Sun-Drop or Franklin could terminate the agreement "at will" upon 30 days notice. Thus, the "at will" nature of Helton's agreement would not affect Franklin's valuation of the distribution rights.

But Helton further argues that if Sun-Drop had the right to terminate its distribution agreement with Helton "at will," it would have terminated Helton's Maury County distribution rights "at will" and then sold those rights to Franklin itself. This does not necessarily follow, however, because such action could have been viewed as adverse to its long-term interests. A business in Sun-Drop's position would not generate good-will by terminating Helton's Maury County rights "at will" and then attempting to sell those rights to Franklin. Such an arbitrary use of termination rights could have caused Franklin to conclude that the distribution rights were worth significantly less, if Sun-Drop had a reputation of arbitrarily terminating distributers' rights.

Helton next argues that Sun-Drop's past threats to terminate the 67 Agreement have always stated a cause for doing so, and in this case, it first mentioned this right in a pre-trial brief in the trial court. As for Helton's assertion that Sun-Drop did not claim the right to "at will" termination until this case, the record establishes that Helton had known of Sun-Drop's claim to this right since, at least, 1982.

Although Helton has been a Sun-Drop distributor since 1967, his conduct under the 67 Agreement appears to be that of someone operating under an uncertain, transitory agreement. Until recently, Helton had not filed federal income tax returns, not maintained income statements, balance sheets, profit and loss statements, or any other business records; and did not maintain a business bank account. Rather than establish a business location, Helton operated his distribution business from his home, with a minimal inventory. All of this conduct does not evidence an understanding of a permanent business relationship.

When Helton and Sun-Drop created the 67 Agreement, they had a history of business dealings. Helton's history with Sun-Drop began in 1955, when Helton and Sun-Drop entered their first oral agreement (the "55 Agreement"). Under that agreement, Helton distributed Sun-drop products in certain Middle Tennessee counties, and the relationship lasted until 1960, when Helton unilaterally terminated the 55 Agreement.

Helton testified that he terminated the 55 Agreement because the owner of Sun-Drop at the time, "stayed drunk all the time and I couldn't deal with him." Evidence offered by Helton does not constitute a material breach of the 55 Agreement by Sun-Drop, and we conclude Helton terminated the Agreement without cause. *See, McClain v. Kimbrough Const. Co.*, 806 S.W.2d 194, 197-98 (Tenn. Ct. App. 1990).

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[1]In September, 1979, Helton entered into a contract to sell his distribution rights to a certain part of Maury County to Franklin Distributing in exchange for $150,000.00.

Another significant circumstance which relates to the conduct of the parties was, that in 1967, Sun-Drop had executed a license agreement with Sun-Drop Sales Corporation of America, which provided for a year-to-year renewable term which could be terminated at the will of either party within 30 days of the end of the year. Thus, at the time of the 67 Agreement, Sun-Drop's ability to bottle and sell products was subject to an "at-will" termination every 11 to 12 months. It follows, that as a practical matter, Sun-Drop would not grant Helton rights with more permanence than those enjoyed by Sun-Drop, vis a vis its licensor. The conduct of the parties under the 67 Agreement and the circumstances that existed at the time of its creation, is evidence which establishes the terms of the contract between the parties. The evidence does not preponderate against the Trial Court's finding that the oral contract is terminable at-will by either party upon reasonable notice.

Finally, Helton argues that *Marshall County Distrib. Co. v. Sundrop Bottling Co.*, Nos. 86-170-II, 86-357-II, 1987 WL 11324 (Tenn. Ct. App. 1987) binds the parties. In that case, the plaintiff, Marshall County Distributing Co. ("Marshall"), sued to enjoin Sun-Drop from terminating an oral distribution agreement. The trial court held that the agreement could only be terminated for cause and that cause did not exist. *Id.* at *2. This Court affirmed. *Id.* at *1. In *Marshall County Distrib. Co.*, the evidence established that Sun-Drop's management had assured Marshall's ownership that "there was no danger of losing the distributorship." *Id.* at *2. There is simply no evidence in the record that Sun-Drop at any time assured Helton that there was "no danger of losing" his distributorship. The *Marshall County Distrib. Co.*, case is factually different, and it does not govern the issue before us.

As to the issue of whether the Trial Court erred in finding Sun-Drop had cause to terminate the oral agreement, our affirming the Trial Court's finding that the oral contract was terminable at will renders this issue moot.

As to the issue of whether the Trial Court erred in ruling that Sun-Drop could not unreasonably withhold its consent to assignment of Helton's distribution rights pursuant to the oral agreement, we conclude this issue is not justiciable under the Declaratory Judgment Act.

The Tennessee Supreme Court described the limitations placed upon the operation of the Act as follows:

> **[A] declaratory judgment action cannot be used by a court to** decide a theoretical question, *Miller v. Miller*, 149 Tenn. 463, 261 S.W. 965, 972 (1924), render an advisory opinion which may help a party in another transaction, *Hodges v. Hamblen County*, 152 Tenn. 395, 277 S.W. 901, 902 (1925), or "**allay fears as to what may occur in the future**," *Super Flea Mkt.*, 677 S.W.2d at 451. Thus, in order to maintain an action for a declaratory judgment a justiciable controversy must exist. *Jared v. Fitzgerald*, 183 Tenn. 682, 195 S.W.2d 1, 4 (1946). For a controversy to be justiciable, a real question rather than a theoretical one must be presented and a legally protectable interest must be at stake. *Cummings v. Beeler*, 189 Tenn. 151,

> 223 S.W.2d 913, 915 (1949). **If the controversy depends upon a future or contingent event, or involves a theoretical or hypothetical state of facts, the controversy is not justiciable.** *Story v. Walker*, 218 Tenn. 605, 404 S.W.2d 803, 804 (1966). If the rule were otherwise, the "courts might well be projected into the limitless field of advisory opinions." Id.

State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 193 (Tenn. 2000) (emphasis added).

Neither the Trial Court nor the parties claim that Helton had assigned his distribution rights to anyone. Although the Trial Court found "Helton had basically turned the operation of his business over to his son," the Court did not express a finding that Helton assigned his distribution rights to his son or anyone else. In its brief, Sun-Drop argues that "in the honest exercise of its business discretion and judgment, Sun-Drop has the right to approve or disapprove the next person, if any, that it entrusts with its rights and obligations." A declaratory judgment on this issue could pre-judge what could happen in a future case, and therefore, this controversy is not justiciable. The Trial Court erred in entering a declaratory judgment on this issue. *See Combustion Engineering Co. v. Thompson*, 231 S.W.2d 580, 582-83 (Tenn. 1950); *U.S. Fidelity & Guar. Co. v. Askew*, 191 S.W.2d 533, 534 (Tenn. 1946); *Nashville Trust Co. v. Dake*, 36 S.W.2d 905, 905-06 (Tenn. 1931).

We affirm the Trial Court's declaration that Sun-Drop has "the right to terminate the [oral] contract without cause upon reasonable notice, if the same is done in fairness, including purchasing items that are unique to the products distributed by Sun-Drop, such as inventory and equipment, for fair value." We vacate the Trial Court's declaration that "the transfer or assignment of distribution rights by Helton, requires the consent of Sun-Drop. . . .[, and such consent] cannot be unreasonably withheld."

The cause is remanded and in our discretion, we assess one-half of the costs of appeal to Sun-Drop Bottling Co., and one-half to Herb Helton.

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HERSCHEL PICKENS FRANKS, P.J.